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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W. -- Room 222
Washington, DC 20554

Re: Ex Parte CC Docket No. 96-98; RM 9101/- Implementation
of the Local Competition Provisions of the Telecommunications
Act of 1996

Dear Mr. Caton:

A copy of the enclosed was delivered today to Jake Jennings, Radhika Karmarkar, Wendy Lader, Don Stockdale and Richard Welch of the Common Carrier Bureau for inclusion in the record in the above referenced proceeding.

Two copies of this Notice are being submitted to the Secretary of the FCC in accordance with Section 1.1206(a)(1) of the Commission's Rules.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Albert M. Lewis".

Enclosure

cc: Jake Jennings
Radhika Karmarkar
Wendy Lader
Don Stockdale
Richard Welch

Re: Authority of the Commission to Promulgate OSS
Performance Measures After the Eighth Circuit's
Decision

In light of the Eighth Circuit's recent decision in Iowa Util. Bd. v. FCC, some incumbent local exchange carriers ("LECs") have maintained that the Commission lacks jurisdiction to establish Operations Support Systems ("OSS") performance measurements, reporting requirements, enforcement procedures, and default performance standards. As proposed by LCI and CompTel in their joint Petition for Expedited Rulemaking, these rules would largely establish measurement categories, methodologies, and reporting procedures that would be used to determine the quality of the OSS and OSS access provided by incumbent LECs both to competitive LECs and to themselves. Thus, they would be used to determine whether competitive LECs are receiving the "nondiscriminatory" performance mandated by the Act -- i.e., performance at parity with that which the incumbents themselves enjoy. The petitioners further propose that default standards be employed where incumbent LECs are unable or unwilling to provide the information necessary to determine whether their OSS and OSS access are being provided at parity (with the incumbents always free to demonstrate that their performance for themselves is inferior to one or more of those standards and that they therefore need not comply with those particular standards in providing facilities and services to competitors).

Nothing in the Eighth Circuit's decision casts doubt on the Commission's authority to promulgate such rules. To the

contrary, that decision reaffirms such authority. The Eighth Circuit upheld the Commission regulations that implement the statutory requirement that access to unbundled network elements (including specifically OSS) and services for resale be "nondiscriminatory," and the proposed OSS rules would be issued pursuant to the same authority and for the same purpose as those regulations.

In Iowa Utilities Board, the incumbent LECs advanced numerous challenges to the Commission's regulations implementing incumbent LECs' duties to provide access to unbundled network elements under Section 251(c)(3) of the Act. The Eighth Circuit, however, largely rejected those challenges and upheld the Commission's rules as a lawful exercise of its delegated authority. Most importantly, for present purposes, the Eighth Circuit upheld 47 C.F.R. § 51.319(f), which requires an incumbent LEC to provide "nondiscriminatory access" to "Operations support systems functions [which] consist of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC's databases and information" (emphasis added). See Iowa Util. Bd., slip op. at 130-133. The Eighth Circuit also upheld 47 C.F.R. § 51.313(b-c), which requires an incumbent LEC to provide "a carrier purchasing access to unbundled network elements with the pre-ordering, provisioning, maintenance and repair, and billing functions of the incumbent LEC's operations support system" on "terms and conditions . . . no less favorable to the requesting

carrier than the terms under which the incumbent LEC provides such elements to itself" (emphasis added). Thus, the Eighth Circuit upheld the FCC regulations that mandate exactly what the petitioners are seeking here -- equal access to incumbent LECs' OSS.

The Commission's authority to issue regulations designed to assure nondiscriminatory access to OSS is further supported by the fact that the Eighth Circuit also upheld numerous other Commission regulations implementing Section 251(c)(3)'s nondiscrimination principle. For example, the court upheld the Commission's requirement that "[a]n incumbent LEC shall provide ... nondiscriminatory access to network elements on an unbundled basis" 47 C.F.R. § 51.307(a) (emphasis added). Likewise, the court approved the Commission's determination that "the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be at least equal in quality to that which the incumbent LEC provides itself." 47 C.F.R. § 51.311(b) (emphasis added). See also 47 C.F.R. § 51.305(a)(3) (requiring interconnection "that is at a level of quality that is equal to that which the incumbent LEC provides itself"); id. § 51.305(a)(5) (requiring interconnection on "terms

and conditions that are no less favorable than the terms and conditions the incumbent LEC provides interconnection to itself").¹

The Eighth Circuit's treatment of the Commission's so-called "superior quality rules," 47 C.F.R. § 51.305(a)(4), 51.311(c), rather than casting doubt on the Commission's power to implement the parity requirements of the Act with respect to OSS, further confirms that power. In striking down these rules, the court observed that although Section 251(c)(3)'s nondiscrimination provision does not give the Commission authority to require "superior quality interconnection," it does empower the Commission to promulgate regulations that require incumbent LECs to provide access to competitive LECs "equal" to their own. Iowa Util. Bd., slip op. at 139-40. Moreover, even while rejecting the FCC's superior quality regulations, the court expressly upheld the Commission's rules mandating that incumbent LECs modify their facilities to the extent necessary to provide competitive LECs with equal access. Id. at 140 n.33.

The statutory basis for the Commission's authority in these areas is clear. The Eighth Circuit obviously recognized that since the Commission is "specifically authorized" to determine "what network elements should be made available for purposes of

¹ Although the Eighth Circuit did not address each of these rules individually, the incumbent LECs had asked the Court "to vacate the FCC's entire First Report and Order," Iowa Util. Bd. at 153, and the Court instead "uph[e]ld all of the Commission's unbundling regulations except for rules 51.305(a)(4), 51.311(c), 51.315(c)-(f), and 51.317." Id. at 151 n.38.

subsection [251](c)(3)" (see 47 U.S.C. § 251(d)(2); Iowa Util. Bd., slip op., pp. 103-104 n.10, 119 n.23), it would make no sense if the Commission likewise could not adopt rules governing their functionalities. Indeed, the Commission properly chose in the Local Competition Order (§ 259) to "identify elements [not] in rigid terms, but rather by function" -- and those functions are required by statute to be performed on a nondiscriminatory basis. Thus, because network elements are defined by the functions they perform, it is frivolous to suggest that the Commission's authority to define network elements excludes issues of performance. An incumbent LEC cannot, for example, comply with its duty to provide unbundled switching -- as defined by the Commission -- by giving access to a switch that does not work for competitive LECs as well as it works for the incumbent.

The Commission's authority to promulgate rules on nondiscriminatory OSS performance in the resale context is also confirmed by the Eighth Circuit's decision. The Eighth Circuit expressly upheld the Commission's authority under Section 251(c)(4)(B) to adopt rules that "define[] the overall scope of the incumbent LECs' resale obligations." Iowa Util. Bd., slip op. at 152-53. And as the Commission explained in its Local Competition Order, its regulations requiring nondiscriminatory access to OSS were also adopted pursuant to that provision. See Local Competition Order § 517 ("nondiscriminatory access to operations

support systems" is a "term or condition of . . . resale under Section 251(c)(4)".

In sum, far from undermining the Commission's authority to promulgate regulations implementing the requirement that incumbent LECs provide their competitors with OSS and OSS access at a quality equal to that which the incumbent itself enjoys, the Eighth Circuit's decision reaffirms that authority. And the rules proposed by the petitioners, aimed at measuring the current level of quality of incumbent LECs' OSS as provided to the incumbent LECs themselves and as provided to competitive carriers, are vital to ensuring such equal access. Indeed, without clear performance measurements and reporting requirements, regulatory agencies will have no ability to determine whether incumbent LECs are fulfilling their nondiscrimination obligations under the Act.

It is equally clear that the Commission has authority to promulgate regulations proposed by petitioners that would set "default performance intervals." These default performance intervals would take effect only when an incumbent LEC had failed or refused to supply appropriate data for any measurement category, and would thus seek to enforce the Act's parity requirements in the absence of information from the incumbent LEC. Once the incumbent LEC provides such information, then the performance standards would be determined by the incumbent LEC's own performance intervals. See generally LCI Comments, CC Docket No. 96-98, at 6-7 (July 16, 1997) (corrected version).

As such, the performance standards are well within the scope of the statutory authority discussed above allowing the Commission to promulgate regulations that require incumbent LECs to provide equal access to OSS. In fact, these standards are essential to preventing incumbent LECs from discriminating against competitive LECs by simply failing to provide the measurement data necessary to determine their true level of OSS performance. Moreover, these default rules are also a reasonable response to the fact that incumbent LECs have exclusive access to most of the information necessary to determine their actual OSS performance; setting default performance standards gives incumbent LECs incentives to come forward with information regarding their true levels of OSS performance, thereby allowing regulators accurately to determine the quality of OSS access to which competitive LECs are entitled.